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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FENON ALI MORRISON, Defendant and Appellant.	B171064 (Los Angeles County Super. Ct. No. BA247438)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dale S. Fischer, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Fenon Ali Morrison was convicted by jury of second degree robbery (Pen. Code, § 211)[1] and attempted second degree robbery (§§ 664/211), each with the use of a firearm (§ 12022.53, subd. (b)). He was sentenced to state prison for a term of two years eight months. He appeals from the judgment and contends that his waiver of *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*)) is invalid. We reject the contention and affirm the judgment.

THE FACTS

At approximately 2:30 a.m., on May 12, 2003, Diana Vasquez was working at the drive-through window at the Jack-in-the-Box restaurant on York Boulevard at Figueroa Street in Los Angeles. A male pedestrian, partially masked and wearing a hood, attempted robbery at gunpoint. When he approached and demanded money, Vasquez did not respond and ran away from the drive-through window to another part of the restaurant. The robber left, and the police arrived.

Shortly thereafter, the police department received a second call of a robbery regarding Noemi Guardado, who had pulled over at Figueroa Street near Glen Arroyo because she had a flat tire. A man approached her while she was on her cellular telephone with her mother. He demanded money at gunpoint, and she gave him $115 in folded currency. The man ran southbound on Figueroa Street.

Los Angeles Police Officers Luis Gasca and Marco Mendoza spoke briefly to Guardado, then drove southbound on Figueroa Street and through an adjacent residential area. The officers observed appellant, who matched Guardado's description. Officer Gasca put on the police car's high beams. Appellant looked in their direction, got a startled look on his face, glanced around, and turned and walked in the opposite direction, hesitating for a moment behind a parked green car. The officers detained him. Appellant was breathing heavily and perspiring. He said that he was walking from his residence to another location, but when the officers initially had observed him, he had been walking

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[1] Unless otherwise specified, all further statutory references are to the Penal Code.

towards his residence. Officer Loera found a stack of folded currency on the ground, behind the wheel of the car, where appellant had hesitated.

In a field identification procedure and later in a six-pack identification procedure, Guardado identified appellant as the robber. In the field, she also identified the folded currency as hers. Vasquez was shown a six-pack display containing appellant's photograph, but she could not make an identification. The officers found a white T-shirt similar to the rag or shirt held by the robber during the Guardado robbery in the nearby parking lot of a Smart & Final store, which appellant had been observed to enter. The victims' descriptions of appellant's clothing and mask and a bystander's testimony about seeing appellant walking on Figueroa Street, first with and then without a dark sweatshirt, corroborated Guardado's claim that appellant was the robber.

On May 13, 2003, appellant waived his *Miranda* rights and confessed to the robbery and the attempted robbery. Appellant stated that he attempted to rob the Jack-in-the-Box because he had a narcotics problem. He said that when the cashier turned and left, he ran south on Figueroa until he saw a Hispanic female in a car with a flat tire. He demanded money of her, but she attempted to give him her purse. Appellant told her not to give him the purse but to give him money instead, which she did. Appellant ran westbound towards Smart & Final and was taken into custody. Appellant also said that he did not have a gun but a rolled up piece of paper which he threw into a trash can along with his jacket.

At trial, appellant presented no defense.

DISCUSSION

Appellant contends that his *Miranda* waiver was invalid. We disagree.

1. The Pertinent Facts

Before the trial, the trial court held an Evidence Code section 402 hearing regarding the admissibility of appellant's postarrest statements to the police. Detective Mark Raichel testified that on May 13, 2003, he interviewed appellant at Parker Center. The detective read appellant his *Miranda* rights from a "standard LAPD *Miranda* card." He advised appellant: "You have the right to remain silent. If you give up the right to

remain silent, anything you say can and will be used against you in a court of law. You have the right to speak to an attorney and have him present during questioning. If you so desire and cannot afford an attorney, one will be appointed to [*sic*] you before questioning."

After advising appellant of his *Miranda* rights, the detective asked appellant the following questions: (1) "Do you understand each of the rights that I've read to you?" (2) "Do you wish to speak to me?" and (3) "Do you wish to speak to me without an attorney present?" Appellant replied, "Yes," to all three questions.

During cross-examination, Detective Raichel testified that he had recorded appellant's answers on the back of an "LAPD form 510" but that the form was missing from appellant's "package." The detective had also recorded appellant's responses in a follow-up investigation report.

In response to defense counsel's question whether he had interviewed appellant on May 12, 2003, Detective Raichel replied that he did not recall. Defense counsel showed the detective the arrest report, and the detective testified that nothing in the report indicated there was an interview on May 12, 2003. Defense counsel then showed the detective the "Admonition of Rights" on the arrest report's first page, which was followed by the detective's name and badge number.

Defense counsel asked Detective Raichel if he had read appellant the *Miranda* admonition at the police station. The detective replied, "I don't recall." Counsel then pointed to a place in the arrest report on page four where it stated, "At the station, [appellant] was admonished of his *Miranda* rights by Detective M. Raichel." He asked if the detective's recollection was refreshed, and the detective answered, "No."

Counsel then marked the reverse side of the copy of an LAPD form 510, which he asked the detective to examine. Answers on the form were, "Yes," "Yes," and "Yes," and the following: "I don't have anything to say. They just stopped a Black man. They didn't find anything. They said they have witnesses. I have nothing to say." The detective acknowledged that the form appeared to be the reverse side of the LAPD form 510 for the current case and that the handwriting on the back of the card was his.

Nevertheless, he did not recall the responses recorded there or that appellant had made such statements during the *Miranda* questioning.

The trial court found that the police report memorialized the confession and that it indicated that the interview had occurred on May 13, 2003.

Defense counsel argued that the entry on the police report indicated that the interview had occurred on May 12, 2003, or that there were two interviews. He further argued that regardless of when the interview occurred or whether there were one or two interviews, the reverse side of the LAPD form 510 indicated that by asserting he had nothing to say, appellant had invoked his right to remain silent. Counsel argued that appellant had not thereafter reinitiated contact with the detectives.

The trial court found the detective to be credible and ruled that the prosecution had met its burden of showing a knowing and intelligent waiver of rights. The trial court commented that appellant did not refuse to waive his rights. After the waiver, appellant simply said that he had nothing to say, which is something different. The trial court did not interpret appellant's remarks after the express waiver as an invocation of *Miranda* rights. Also, even if there had been two interviews, given appellant's failure to invoke his right to remain silent, there was nothing wrong with the officers questioning appellant the following day to see if he had anything further to say.

2. The Guiding Legal Principles

In considering a claim that a statement or a confession was obtained in violation of a defendant's rights under *Miranda*, we undertake an independent review of the record to determine if the right to remain silent was invoked. (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 359.) We independently determine from the undisputed facts and those facts properly found by the trial court whether the challenged statement was elicited in violation of *Miranda*. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.) In making this determination, we apply federal standards. (*Ibid*.; accord, *People v. Boyette* (2002) 29 Cal.4th 381, 411.)

Law enforcement officials must stop questioning a suspect who asserts his right to stop an interrogation. "'If the individual indicates in any manner, at any time prior to or

during questioning, that he wishes to remain silent, the interrogation must cease.'" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238, quoting *Miranda*, *supra*, 384 U.S. at pp. 473-474.) However, whether a suspect has invoked that right is a factual question to be decided in light of all the circumstances. (*People v. Musselwhite, supra*, at p. 1238.)

3. The Analysis

Citing *People v. Porter* (1990) 221 Cal.App.3d 1213[2] and *People v. Carey* (1986) 183 Cal.App.3d 99, appellant argues that as a matter of law, by stating that he had nothing to say, appellant invoked his right to remain silent.[3]

Substantial evidence supports the trial court's conclusion that the waiver on the back of the Los Angeles Police Department's form 510 was given to the detective on May 13, 2003 and that there was only one attempt to interview appellant and one waiver of *Miranda* rights. Substantial evidence also supports the trial court's conclusion that appellant waived his *Miranda* rights by replying, "Yes," "Yes," and "Yes," to the questions and that any further comments that appellant made thereafter were merely his statements to the detective regarding the offense. We give considerable weight to a trial court's findings, and after independently reviewing the circumstances here, we agree that appellant's comments amount to nothing more than a denial that he was involved in the robberies, a claim that he was arrested by reason of his race, and his expression that he intended to stick with his story regarding the crimes.

As the court in *People v. Musselwhite, supra*, 17 Cal.4th at page 1240 observed, there are a number of decisions where similar contentions were raised and the California courts have concluded that the defendants' statements were something less or something

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[2] *People v. Porter*, *supra*, 221 Cal.App.3d 1213 was overruled by implication on a different point as explained in *People v. Boyer* (1989) 48 Cal.3d 247, 279-280, footnote 23.

[3] Appellant explicitly makes no claim of error based upon the trial court's alternate ruling that if there was an attempted interrogation on May 12, 2003, it did not affect the validity of the waiver on May 13, 2003.

other than an invocation of rights: in *People v. Davis* (1981) 29 Cal.3d 814, 823-824, the defendant's single statement during a polygraph examination that he did not want to answer a question was not an assertion of *Miranda* rights; in *People v. Jennings* (1988) 46 Cal.3d 963, 977-979, the defendant's statement, made after an accusatory question by the questioning police officer, that "'I'm not going to talk' . . . . 'That's it. I shut up'" reflected "only momentary frustration and animosity" toward one of the officers and was not an invocation of his right to remain silent; in *In re Joe R*. (1980) 27 Cal.3d 496, 516, in context, the defendant's statement, "'That's all I have to say'" or "'That's all I want to tell you,'" did not amount to assertion of right to remain silent, and what he was truly expressing was, "That's my story, and I'll stick with it"; and in *People v. Silva* (1988) 45 Cal.3d 604, 629-630, the defendant's statement, "'I really don't want to talk about that,'" did not amount to invocation of *Miranda*.

Appellant argues two California decisions require a reversal. In *People v. Carey*, *supra*, 183 Cal.App.3d at page 105, the following colloquy occurred when the police officer asked appellant for a waiver of his *Miranda* rights. [Defendant:] "'I ain't got nothin' to say.' [¶] Detective Sharpe: 'Is that, you don't know what to say or you'll answer some questions of mine?' [¶] [Defendant:] 'I ain't got nothin' to say at all.' [¶] Detective Sharpe: 'I don't understand, I mean, saying you have nothing to say.' [¶] [Defendant:] 'I ain't got nothin' to say, nothin', nothin'." [¶] Detective Sharpe: 'You don't want to say anything?' [¶] [Defendant:] 'I ain't got nothin' to say.' [¶] Detective Sharpe: 'How about if I asked you questions? Would you have some response to those?' [¶] [Defendant:] 'It all depends on the questions.' [¶] Detective Sharpe: 'Okay, then why don't you answer the questions you can and the ones you can't, allright? [*Sic*.]'" (*Id*. at pp. 103-104.) After this exchange, the officer continued to interrogate the defendant, and the defendant eventually admitted incriminating facts about the offense. On appeal, the reviewing court found an unambiguous invocation of the defendant's right to remain silent. (*Id*. at pp. 104-105.)

In *People v. Porter*, *supra*, 221 Cal.App.3d at pages 1217-1220, the defendant waived his *Miranda* rights by telling the detectives, "Sure," then he had an exchange with

the detectives in which he said, "'Cause I obviously drove it up here. Um, ah, yeah I know about the burglary, but I'm not gonna say any more than that.'" (*Id*. at p. 1217.) After one detective asked the defendant a series of questions about the car and his whereabouts before the crimes in question, appellant inquired about extradition and then said, "Okay, well I think I'll just save it for when I get there and . . . 'cause I wanna decide what I want to do.'" (*Ibid*.) The detectives resumed questioning, and the defendant continued answering during an approximate one-hour interview. The defendant ultimately confessed to committing an auto theft and two burglaries. (*Ibid*.) The *Porter* court found that the defendant's statements amounted to an invocation of rights, particularly because of his latter comment. (*Id*. at p. 1220.)

We do not find that either *People v. Carey* or *People v*. *Porter* require a reversal because each case can be distinguished from the instant case by their facts.

Even if we agreed with appellant that his comments following his explicit *Miranda* waiver were ambiguous and required a cessation of questioning, or at least questioning to clear up the ambiguity (*People v. Box* (2000) 23 Cal.4th 1153, 1194), we would not reverse the judgment. Any error is nonprejudicial. (*People v. Cahill* (1993) 5 Cal.4th 478, 487.)

The evidence of guilt was overwhelming. Guardado identified appellant as her robber in the field and at the trial, and she was certain of her identification because of appellant's unusually large size, his huge belly, and his unique facial characteristics. The two witnesses who saw appellant at the Jack-in-the-Box could not identify appellant, but they described a man who looked like appellant who was wearing a gray sweatshirt and identified the robber in a store videotape that was viewed at trial by the jury. The two robberies occurred almost simultaneously several blocks from one another. In that same time frame, a bystander saw appellant, a large man, jogging northbound on Figueroa in a gray sweatshirt, a description that matched that given by the robbery victims. Five minutes later, the bystander saw appellant running southbound without the sweatshirt and running towards the residential area where he was later detained. The police found a discarded white T-shirt in the parking lot of the Smart & Final store which he would have

passed through to enter the residential area. Upon his detention, appellant dropped Guardado's $115 in currency. He had apparently been running and he acted furtively. On this record, any error in admitting his statements to the police into evidence was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 36.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL RECORDS.

_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

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